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Supreme Court of the United States

October Term, 1944

No. 942

FRANCIS MARITOTE
Petitioner

against

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT and BRIEF IN SUPPORT OF PETITION

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Francis Maritote, respectfully alleges:

A

Summary Statement of Matter Involved

Petitioner, by an indictment filed in the United States District Court for the Southern District of New York, on March 18, 1943, was charged, together with Frank Nitti, Paul DeLucia, Phil D'Andrea, Charles Gioe, John Rosselli, Louis Kaufman and Ralph Pierce, together with George E. Browne, William Bioff and Nick Circella, confederates, and with other persons unknown to the Grand Jurors, with entering into a conspiracy and conspiring

with each other to violate Section 420a of Title 18, U.S.C.A., known as the Anti-Racketeering Act. The indictment alleged that the aforesaid conspiracy was entered into on or about said day of June 18, 1934, within the Southern District of New York, and within its jurisdiction, wherein they conspired and agreed to obtain money by the use of and threat to use force, violence and coercion from persons or corporations engaged in interstate commerce in the production, distribution or exhibition of motion picture films.

The persons or corporations designated and referred to therein as "victims" included Loew's, Paramount, Twentieth Century-Fox and other firms, persons and corporations, "whose names are to the Grand Jury unknown." This indictment was certified by the Grand Jurors as a true bill.

The trial of the action occupied approximately twelve weeks.

Frank Nitti died prior to the trial, resulting in a dismissal of the case as to him. The motion to dismiss against Ralph Pierce was granted at the conclusion of the evidence. Kaufman was sentenced to seven years imprisonment and to pay a $10,000 fine. The remaining defendants, including petitioner, were found guilty by the jury and received the maximum sentence of ten years imprisonment and were each fined $10,000.

An appeal was thereafter taken to the Circuit Court of Appeals for the Second Circuit and on December 20, 1944, the said Court filed its opinion affirming the judgments of conviction. A petition for rehearing was denied on January 8, 1945.

To avoid repetition and for the sake of brevity, the matters set forth in the petitions and briefs filed in this Court by the other defendants for a writ of certiorari are herewith in all respects adopted by the petitioner who respectfully requests that the same may be considered as though they were incorporated herein.

Bioff and Browne were the principal witnesses who testified for the Government as to the formation of the conspiracy alleged in the indictment. These two witnesses testified that some time in April, 1934, in a house at Riverside, Illinois, a suburb of Chicago, several meetings took place between themselves and Nitti, Compagna, DeLucia and Circella. Included with the aforementioned were Frank Rio and Louis Buchalter, more notoriously known as Lepke. Browne, at the time was an official of the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, commonly known as the I.A.T.S.E., a labor union affiliated with the American Federation of Labor. Bioff was the personal representative of Browne.

It is alleged that at these meetings the conspiracy was hatched wherein and whereby it was agreed that control of the I.A.T.S.E. was to be obtained through the medium of the election of Browne as International President of the Union at the coming elections in October, 1934, to be held in Louisville, Kentucky, where the convention was to meet. Bioff testified that ways and means were discussed at these meetings to bring about the election of Browne at the coming convention in Louisville.

It was testified to that petitioner was present at the said convention in Louisville, Kentucky, not as an accredited delegate thereto, but was there for the purpose of intimidating the delegates and to see that they voted for Browne (R. 146). Browne had no opposition for the office of President of the International and was elected.

This is the first mention of petitioner in connection with the alleged conspiracy, no direct testimony having been presented or adduced at the trial that petitioner had participated in the aforesaid meetings where the conspiracy is alleged to have been born. Nor was there any direct testimony presented by the Government that petitioner knew of the existence of such conspiracy or its purposes, either at the formation thereof or at any time thereafter.

Petitioner is next mentioned by one Barger, who testified that after being in the circus business in Iowa, he moved to Chicago in 1932 where he opened a burlesque theatre known as the Star and Garter (R. 2110). In order to stifle competition, Barger, in 1932, paid the operators of the Haymarket Theatre, competitors who conducted a similar enterprise, the sum of $150 a week not to renew their lease. This was agreed to in writing, and when Bioff and Browne complained that this agreement would result in the lay-off of union men, Barger agreed to pay and did pay to Bioff and Browne the sum of $150 per week until 1935, when the Star and Garter Theatre closed (R. 2113).

Thereafter, Barger opened another burlesque house in Chicago known as the Rialto and Barger testified that he paid Maritote the sum of $175 per week commencing some time in December, 1935, or January, 1936, and extending to September 8, 1937, when the last payment was made (R. 2125, 2127); that petitioner performed no services in consideration for said payments; that after he paid petitioner the last sum of money, petitioner did not communicate with him further and had nothing to do with him after that time (R. 2171); that Barger had no contacts with any of the other defendants in this case about the payments (R. 2178). Barger further testified that petitioner refused to take any more money from him (R. 2170) and that he no longer had anything to do with petitioner who dropped out of the picture as far as he was concerned in September, 1937 (R. 2190); that petitioner was at the home of Ralph Capone (R. 2927).

B

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 347(a); Section 240(a) of the Criminal Court, as amended by the Act of February 13, 1925; and Rule XXI of the Rules for Criminal Appeals, promulgated by this Court on May 7, 1934.

C

Statute Involved

Section 420(a) of Title 18 of the United States Code of the Act of Congress, dated January 18, 1934, entitled "An Act to Protect Trade and Commerce against Interference by Violence, Threats, Coercion or Intimidation" and known as the Anti-Racketeering Act. The material portions of this Act so far as relevant to this cause, provide:

> (420a) "No person should, in connection with or in relation to any act, in any way or in any degree affecting trade or commerce of any article or committee moving or about to move in trade or commerce * * *
>
> "Obtains or attempts to obtain by the use of or attempt to use or threat to use force, violence or coercion, etc. * * * shall be punished by imprisonment from 1 to 10 years or by a fine of $10,000, or both." (June 8, 1934, Ch. 569, Sec. 2, 48 Stat. 979.)

D

Questions Presented and Reasons Relied on For the Allowance of the Writ

The petitioner herein hereby adopts all the statements set forth under this heading contained in the petitions herewith filed by the other defendants and respectfully prays that this Court consider such statements as though herein set forth.

Petitioner has been found guilty and sentenced to a maximum term of 10 years imprisonment and to pay a fine of $10,000 upon evidence so unsubstantial as to constitute a denial of due process of law guaranteed by the Fifth Amendment.

(I)

The only evidence contained in the record from which the Government attempted to blanket Petitioner with the conspiracy is that (1) he attended the convention in Louisville, Kentucky of the I. T. A. S. E. in 1934 when Browne was the unopposed candidate for the Presidency thereof, (2) that he collected monies from Barger in Chicago for a period commencing December 1935, or January of 1936, and ending September 8th, 1937, and (3) that he was at the home of Ralph Capone (R. 2927). Such is the sum of the proof and upon said proof Petitioner was convicted.

It is significant, as was shown by the testimony, that there were many others at the said convention in addition to Petitioner and who were known to the Government but who nevertheless escaped indictment. It is significant for the reason that the Government realized that the mere presence at the convention was not sufficient proof even for an indictment to spell out knowledge of and adherence to the conspiracy of such "wide scope, long duration, vast returns" as stated in the opinion of the Court below. Not a scintilla of evidence was presented at the trial which would even tend to indicate that Petitioner participated in any act at said convention to bring about the furtherance of the alleged conspiracy. There is not an iota of evidence to warrant the conclusion indulged in by the Prosecutor with assention of the Court that Petitioner was delegated by the Defendants the function of channeling the votes cast at said convention for the election of Browne.

(II)

The question as to whether Barger, an exhibitor, was one who was engaged in interstate commerce was a fact which necessitated proof thereof and to establish such fact was of the utmost importance. No proof whatsoever

was elicited for the record to establish the interstate character of Bargar's burlesque house. This is the kernel of the case and the failure of such proof was fatal and removed Petitioner from the orbit of the entire charge contained in the indictment.

(III)

The wholly unwarranted conclusions without any basis in fact indulged in by the Prosecutor on the trial of this action were of such persistency and character as to deprive Petitioner of due process of law. The proceedings were conducted by the prosecution in such a prejudicial spirit and manner and such inexcusable tactics were indulged in before the Jury as to render the trial of Petitioner a farce and to do violence to the fundamental concept of the well established doctrine pertaining to a fair trial. The persistent comments of the Prosecutor and the tactics employed before the Jury created such an atmosphere of prejudice as to destroy any semblance of a fair and impartial trial to which Petitioner was entitled.

(IV)

No further mention is made of petitioner in connection with or in furtherance of the purposes of the alleged conspiracy after 1937. If it was to be assumed arguendo that petitioner was a member of the alleged conspiracy with knowledge of its purposes and knowingly committing acts in furtherance thereof, a period of six years had elapsed between the final collection of moneys from Barger in 1937 to the indictment filed in 1943.

Nowhere in the record is there any evidence connecting petitioner with the conspiracy as alleged in the indictment within three years prior to the filing of such indictment.

Barger testified that petitioner had refused to collect any further moneys from him and so informed him (R.

2188) and that petitioner completely dropped out of the picture at that time (R. 2190).

Under the circumstances, the instruction of the Court to the jury with respect to the law as to the statute of limitations deprived petitioner of the benefit of such statute. The evidence as contained in the record with respect to the activity of petitioner in the alleged conspiracy if we were to assume that petitioner was at any time a member thereof, and the failure of the Government to present any further acts committed by petitioner from 1937 to the filing of the indictment in 1943 constituted an abandonment of such conspiracy by petitioner as a matter of law. In spite of the fact that Barger established that petitioner withdrew and abandoned the alleged conspiracy in 1937 and no further mention is made of petitioner as to the commission of any acts in furtherance thereof or participation therein for a period of six years, the Court instructed the jury that it was still incumbent upon petitioner to take "some affirmative step which is inconsistent with this form of participation. He must do something to arrest the progress of the conspiracy."

The cases do not say what would constitute an affirmative step. What further act was necessary for petitioner to take to commence the tolling of the statute so as to bar prosecution for the alleged conspiracy?

In instructing the jury that it was incumbent upon petitioner *to do something* to arrest the progress of the conspiracy in order to commence the tolling of the statute, it would appear that it was incumbent upon petitioner to present himself before the prosecuting authorities, confess his membership in a conspiracy and request them to arrest him and the progress thereof. Under the instructions submitted by the Court to the jury, the benefit of the statute of limitations was foreclosed to the petitioner.

It was not contended by the Government that petitioner was one of the original conspirators, or participated

in the formation of the conspiracy from its inception, had anything to do with it or had any knowledge concerning it; rather that petitioner was a minor character, joined the conspiracy after it was born and committed acts in furtherance thereof as manifested by his presence at the Convention in 1934 and the collection of moneys from Barger.

These were the facts which were presented to the jury for their speculation,—circumstantial evidence from which they were to infer petitioner's adherence to the alleged conspiracy to sustain the Government's contention. Since the evidence attempting to connect petitioner with the alleged conspiracy was purely circumstantial, it was error to deny petitioner's motion to dismiss upon the ground that petitioner's conduct of non-activity for a period of six years constituted an affirmative act of abandonment of the alleged conspiracy as a matter of law. (*Buhler* v. *United States*, 33 F. 2d 382.)

Wherefore, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit requiring that Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and of proceedings had herein; and that the order of the said United States Circuit Court of Appeals affirming the judgment in this case may be reversed, and that petitioner may have such other relief as this Court may deem appropriate.

Dated: New York, N. Y., February 9th, 1945.

Francis Maritote,
Petitioner

By Vito Marcantonio,
his Counsel.